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Before the

FEDERAL COMMUNICATION COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of	)	
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Rulemaking to Amend Part 1 and Part 21	)	**CC Docket No. 92-297**
of the Commission's Rules to Redesignate	)	
the 27.5 - 29.5 GHz Frequency Band and	)	**RM-7872; RM-7722**
to Establish Rules and Policies for	)	
Local Multipoint Distribution Service	)	

COMMENTS REGARDING THE ESTABLISHMENT OF
AN ADVISORY COMMITTEE TO NEGOTIATE PROPOSED REGULATIONS

Center for Media Education, Consumer Federation of America, and United Church of Christ, Office of Communications ("CME et al.") by their counsel, comment on the Commission's proposal to establish an advisory committee to negotiate proposed regulations in the above referenced proceeding.

INTRODUCTION

CME et al. wish to express their concern over the Commission's evident lack of consideration of this proceeding's impact on the general public. As is discussed at greater length below, the Commission has not taken adequate steps to include representatives of the general public in this endeavor. While it perfunctorily invites the participation of "public interest advocacy groups," the Commission has defined the universe of interested parties in this matter as being those companies having a direct pecuniary interest in the development of this spectrum.

The narrowness of the Commission's approach stems from a constricted perception of the public interests here at stake. First, the American public owns the spectrum to be employed, and the public has a First Amendment right to speak and receive access to diverse

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sources of information over it. If there is to be a spectrum auction, the public has an interest in maximizing the revenue to be derived from it. Second, the public has interests in how the spectrum is deployed which may well differ from the industry groups thus far competing for it. The Commission should consider this spectrum's potential for enfranchising voices which do not own or enjoy access to the media of mass communications, as well as for promoting localism. Third, the public has an interest in having maximum competition. The choices the Commission makes will affect whether new or smaller entities will be able to compete against larger companies and bring new vigor to the marketplace.

BACKGROUND

The Federal Communications Commission has invited comment on its proposal to convene a negotiated rulemaking committee to determine the best use of the 27.5 - 29.5 Ghz band ("28 Ghz band" or "band").[1] The Commission would like the committee to help it decide how to allocate that band of spectrum between two possibly incompatible technologies. One of the competing technologies is Local Multipoint Distribution Service (LMDS), a terrestrial source of video services. LMDS could compete with cable and wireless cable, might provide "last mile" service on the information superhighway, may be a practical broadband alternative for rural areas, and is ready to go into operation.[2] Competing with LMDS for the band are two satellite technologies: Fixed Satellite Service

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[1] Public Notice, Request for Comments Regarding Establishment of an Advisory Committee to Negotiate Proposed Regulations, CC Docket No. 92-297, rel. Feb. 11, 1994 (summarized at 59 Fed. Reg. 7961 (Feb. 17, 1993)) ("Public Notice").

[2] Rulemaking to Amend Part 1 and 21 of the Commission's Rules to Redesignate the 27.5 - 29.5 Ghz Frequency Band and to Establish Rules and Policies for Local Multipoint Distribution Service, Second Notice of Proposed Rulemaking, CC Docket No. 92-297, rel. Feb. 11, 1994, ¶¶ 8-11 (summarized at 59 Fed. Reg. 7964, Feb. 17, 1994) ("2nd NPRM").

(FSS), including NASA's experimental Advanced Communications Technologies Satellite (ACTS), and Mobile Satellite Service (MSS). The satellite interests, which are not yet ready to use the 28 Ghz band but require spectrum for continued growth, also promise a wide range of innovative, even futuristic, services.[3] The Commission has expressed concern that denying them the band would threaten an industry in which the U.S. is a world leader, thus possibly injuring American international competitiveness.[4]

The Commission wants to know whether LMDS and the satellite technologies can share the 28 Ghz band, and if so, how. If the band cannot accommodate both uses simultaneously, the Commission must then decide how to allocate it between them.[5] The Commission intends to ask the negotiated rulemaking committee to resolve these questions, and to justify its solution in terms of: (i) the proper definition of the market for the proposed services; (ii) how much competition the proposed services will offer existing services; (iii) how much the proposed use will stimulate new services and technologies; (iv) how much it will spur investment in telecommunications infrastructure; (v) the kind and number of jobs it will create; and (vi) its impact on economic growth in general.[6]

CME et al. note that what begins as a purely technical matter (devising ways to share spectrum without undue interference) may, if the band cannot be shared, lead to policy choices greatly affecting users of telecommunications services. The Commission should recognize that it is inappropriate for a committee composed almost entirely of profit-driven

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[3] Id. ¶¶ 14-22.

[4] Id. ¶ 45.

[5] Id. ¶¶ 34-45.

[6] Id. ¶ 46.

industry groups to resolve these questions. CME et al. therefore ask that the Commission actively identify user interests and groups qualified to represent those interests, and affirmatively solicit their participation. If necessary, the Commission should provide the financial support required to secure participation by non-profit groups.

I. THE COMMISSION SHOULD IDENTIFY USER INTERESTS AND SOLICIT PARTICIPATION BY QUALIFIED REPRESENTATIVES OF THOSE INTERESTS.

Negotiated rulemaking imposes on the agency the duty of identifying the interests which are likely to be affected by the proposed rule.[7] Thus the agency's role in convening a negotiated rulemaking committee differs from its role in a regular notice-and-comment proceeding, where it need only afford interested persons an opportunity to comment.[8] In contrast to that relatively passive posture, an agency using negotiated rulemaking is responsible for actively securing balanced representation of the identifiable interests that will be significantly affected by the rule.[9]

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[7] "If ... an agency decides to establish a negotiated rulemaking committee, the agency shall publish in the Federal Register and, as appropriate, in trade or other specialized publications, a notice which shall include a list of the interests which are likely to be affected by the rule." 5 U.S.C. § 584(a)(3).

[8] 5 U.S.C. § 553(c).

[9] Negotiated rulemaking is in the public interest where (among other factors) "there are a limited number of identifiable interests that will be significantly affected by the rule, [and] there is a reasonable likelihood that a committee can be convened with a balanced representation of persons who can adequately represent [those] interests ..." 5 U.S.C. § 583(a)(2)-(3).

From the beginning, proponents of negotiated rulemaking have stressed the need for balanced participation. The House Report on the Federal Advisory Committee Act[10] (FACA), which preceded the Negotiated Rulemaking Act[11] (NRA), put the matter this way:

> One of the great dangers in the unregulated use of advisory committees is that special interest groups may use their membership to promote their private concerns. Testimony received at hearings before the [subcommittee] pointed out the danger of allowing special interest groups to exercise undue influence upon the Government through the dominance of advisory committees which deal with matters in which they have a vested interest.[12]

Financially interested parties will be eager to serve on an advisory committee (and will be the most obvious "identifiable interests"). But a committee weighted toward representatives of the affected businesses -- one lacking the essential "balance" -- is unlikely to negotiate the solution that best serves the public interest.

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[10] Federal Advisory Committee Act, Pub. L. No. 92-463, 86 Stat. 770 (1972), reprinted in 1972 U.S.C.C.A.N. 892.

[11] Negotiated Rulemaking Act of 1990, Pub. L. No. 101-648, 104 Stat. 4969 (1990). The requirements of FACA are largely incorporated in the NRA: "In establishing and administering such a committee, the agency shall comply with the Federal Advisory Committee Act with respect to such committee, except as otherwise provided in this subchapter." 5 U.S.C. § 585(a)(2)

[12] H.R. Rep. No. 1017, 92d Cong., 2d Sess. (1972), reprinted in 1972 U.S.C.C.A.N. 3491, 3496. The Report goes on to cite an Office of Management and Budget industrial wastes committee as an example of advisory committee abuse: "When Council members met with government officials to consider a proposed national industrial waste inventory questionnaire, only representatives of industry were present. No representatives of conservation, environment, clean water, consumer, or other public interest groups were present. This lack of balanced representation of different points of view and the heavy representation of parties whose private interests could influence their recommendations would be prohibited by the provisions contained in section 4 of the bill." Id. (emphasis added).

In the instant proceeding, the Commission has identified only three interests[13] -- (a) LMDS developers, manufacturers, and licensees; (b) pending mobile satellite applicants; and (c) fixed satellite service applicants and service providers[14] -- and has composed a list of invitees largely of representatives of these industries.[15] In fact, the Commission appears to have drawn them exclusively from parties who filed comments in response to its earlier NPRM regarding the 28 Ghz band.[16] To its credit, the Commission also says it "must be satisfied that the group, as a whole, reflects a proper balance and mix of interests" and that it is "especially interested in receiving nominations to participate from public interest advocacy groups, user groups, and educators and academics."[17] But CME et al. find this general invitation insufficient unless it produces the necessary result: public and consumer advocates[18] at the negotiating table. These groups may not follow the Federal Register as closely as the affected businesses do. At any rate, few public (and no user) advocacy groups submitted comments in earlier stages of these proceedings. But because their participation is

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[13] The NRA defines "interest" to mean "with respect to an issue or matter, multiple parties which have a similar point of view or which are likely to be affected in a similar manner." 5 U.S.C. § 582(5).

[14] Public Notice ¶ 7.

[15] Id. ¶ 8.

[16] 2nd NPRM app.

[17] Public Notice ¶ 10.

[18] In our view, consumers constitute several identifiable (and quite possibly conflicting) interests as defined by the NRA. Some of these interests might be current and potential cable subscribers, potential users of specialized two-way broadband services, consumers in rural areas where fiber optics will not be economically feasible, users of Very and Ultra Small Aperture Terminals, especially in underserved geographic areas, commercial and residential users of FSS "bandwidth on demand", and those who would benefit from MSS. See 2nd NPRM at ¶¶ 8, 10, 11, 15, 16, 17-22. A committee negotiating the fate of the 28 Ghz band should include members who represent the diverse interests of these consumers.

essential to achieving balanced representation of the affected interests, the Commission should not only identify user interests, but actively reach out to qualified representatives of those interests as well.[19]

In the context of the proposed rulemaking, the Commission has interpreted its broad mandate to serve the public interest to obligate it to "develop regulations for the use of the 28 Ghz band that optimize the public interest benefits to the Nation."[20] But in a negotiated rulemaking where most of the negotiators represent financially interested companies, the Commission risks becoming a mere passive broker between the affected industries. The Commission cannot advance the public interest by overseeing the hammering out of compromises between contending interest groups. Companies hoping to profit from the 28 Ghz band ought not be allowed simply to divide it among themselves, with the Commission presiding over the bargaining.

The Commission's mandate is not to supervise the concerned industries' cutting of the spectral pie; the Commission's mandate is to promulgate rules in the public interest. To do this, the Commission requires a report that can help it identify where the public interest lies. In other words, it needs a report that articulates public concerns other than as rationales for the profit-motivated positions of the industry participants. To get that report, the Commission itself must make sure the committee is well leavened by non-profit public advocacy and user groups.

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[19] The Commission's own Outreach Office may be able to suggest how best to facilitate inclusion of financially disinterested parties. Perhaps a mailing list or notification in trade papers would be helpful. See 5 U.S.C. § 584(a) ("... the agency shall publish in the Federal Register and, as appropriate, in trade or other specialized publications ...").

[20] 2nd NPRM ¶ 2.

II. THE COMMISSION SHOULD PROVIDE FINANCIAL ASSISTANCE TO NON-PROFIT AND USER GROUPS WHEN NECESSARY TO SECURE THEIR PARTICIPATION IN NEGOTIATED RULEMAKING.

Because achieving balanced participation is crucial to the success and validity of negotiated rulemaking, the Commission should also consider providing non-profit groups with financial assistance if they need it in order to participate.

When in 1982 the Administrative Congress of the United States ("ACUS") urged reform of the advisory committee process, it thought bringing all affected interests to the table so important that it advised agencies to consider offering financial support to obtain the proper mix. Specifically, ACUS found that "certain affected interests will require disbursement for direct expenses in order to participate" and counseled that because "the negotiating group will be performing a function normally performed within the agency ... the agency should consider reimbursing the direct expenses of such participants."[21] ACUS's recommendation is preserved in the NRA, which states:

> Members of a negotiated rulemaking committee shall be responsible for their own expenses of participation in the committee, except that an agency may, in accordance with section 7(d) of the Federal Advisory Committee Act, pay for a members reasonable travel and per diem expenses, expenses to obtain technical assistance, and a reasonable rate of compensation, if --
>
> (1) such member certifies a lack of adequate financial resources to participate in the committee; and
>
> (2) the agency determines that such member's participation in the committee is necessary to assure an adequate representation of the member's interest.[22]

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[21] 1 C.F.R. § 305.82-4 Procedures for Negotiating Proposed Regulations (Recommendation No. 82-4, ¶ 9), reprinted in Administrative Conference of the United States, Negotiated Rulemaking Sourcebook 11, 13 (1990) ("Sourcebook").

[22] 5 U.S.C. § 588(c).

CME et al. urge the Commission to take advantage of this NRA mandate to subsidize participation by non-profit and user advocacy groups.

Without such financial assistance, the non-profit public interest sector may not be able to afford to take part in negotiated rulemakings.[23] While the industry participants stand to make vast fortunes from the 28 Ghz band, to user and public advocacy groups the band is but one of many fronts competing for their limited resources. Without help from the Commission, they cannot spare a senior staff member competent to negotiate full-time for several months.[24]

Negotiated rulemaking promises a less contentious method of promulgating regulations. Instead of trying to sway the Commission by taking extreme positions, interested parties can work together to find common ground, and having themselves helped formulate the rules, the parties are less likely to challenge them in court. Thus the Commission not only has help writing the rules, it is also spared the time and expense of litigating their validity. The money the Commission saves through negotiated rulemaking would be well spent securing sufficiently representative committees. Now, when the Commission is just starting to use this promising new approach, is the time to do it right.

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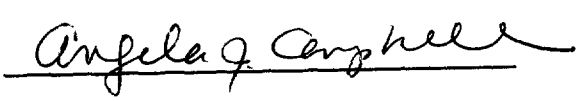
[23] An attorney with a major environmental non-profit organization had this to say about the cost of taking part in negotiated rulemaking: "In our experience, the 'reg neg' process has proved extremely expensive. For example, in the woodstove negotiations, I personally devoted nearly 30 full days to the process--easily three to six times more time than it would have taken to write conventional comments ... non profit environmental organizations simply cannot afford this effort on a regular basis." Sourcebook at 391 (Hearings on S. 1504 Before the Senate Committee on Governmental Affairs, 100th Cong., 2d Sess. (May 13, 1988) (testimony of David D. Doniger, Senior Attorney, Natural Resources Defense Council).

[24] The committee is expected to meet from as early as March to as late as July, 1994. Public Notice ¶ 13.

CONCLUSION

For these good and sufficient reasons, CME et al. ask the Commission to identify user interests, solicit participation by representatives of those interests, and, if necessary, enable them to take part by providing financial support.

Respectfully submitted,



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